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Nos. 75-353, 75-354, and 75-355

In the Supreme Court of the United States

OCTOBER TERM, 1975

HOWARD PIPER, ET AL., PETITIONERS
v.
CHRIS-CRAFT INDUSTRIES, INC., ET AL.

THE FIRST BOSTON CORPORATION, PETITIONER
v.
CHRIS-CRAFT INDUSTRIES, INC., ET AL.

BANGOR PUNTA CORPORATION, ET AL., PETITIONERS
v.
CHRIS-CRAFT INDUSTRIES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's order of November 11, 1975, inviting the Solicitor General to express views of the United States.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a defeated contestant for control of a corporation has a cause of action for money damages against persons who, by violating Section 14(e) of the Securities Exchange Act of 1934 in connection with tender offers made in the course of that control contest, deprived the defeated contestant of a fair opportunity to compete for the purchase of shares in the target company.

2. Whether in such an action, a defendant underwriter's liability is limited to the maximum amount that could be assessed against it under Section 11 of the Securities Act of 1933 for underwriting securities pursuant to a misleading registration statement filed under that Act.

3. Whether the court of appeals correctly determined damages in this case.

We do not separately address the other questions presented by petitioners—concerning, *inter alia,* the sufficiency of the evidence and the appropriateness of joint and several liability—for those questions turn largely upon the particular factual circumstances of this case and the application of well established principles of securities and tort law.

STATUTES AND REGULATION INVOLVED

Section 14(e) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78n(e), provides in pertinent part:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

Section 11 of the Securities Act of 1933, 48 Stat. 82, as amended, 15 U.S.C. 77k, provides in pertinent part:

> (a) In case any part of the registration statement * * * contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security * * * may * * * sue—
>
> * * * * *
>
> (5) every underwriter with respect to such security.
>
> * * * * *
>
> (b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—
>
> * * * * *
>
> (3) that * * * as regards any part of the registration statement not purporting to be made on the authority of an expert * * * he had, after reasonable investigation,

> reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading * * *
>
> * * * * *

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security * * * and (1) the value thereof as of the time such was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment * * * *Provided* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement * * * such portion of or all such damages shall not be recoverable. In no event shall any underwriter * * * be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public.

Rule 10b–6, 17 C.F.R. 240.10b–6, provides in pertinent part that it shall constitute a "manipulative or deceptive device or contrivance" under Section 10(b)

of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. 78j(b), for "any person * * * (2) Who is the issuer or other person on whose behalf * * * a distribution is being made * * * to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distributions * * * or any right to purchase any such security * * *."

STATEMENT

1. BACKGROUND

This case arises out of a contest for control of Piper Aircraft Corporation (Piper), a manufacturer of light aircraft. The contestants were Chris-Craft Industries, Inc. (Chris-Craft), a manufacturer of recreational products, and Bangor Punta Corporation (Bangor Punta), a conglomerate with holdings in diversified fields. The First Boston Corporation (First Boston), an investment banking firm and also a registered broker-dealer, served as investment adviser to Piper and as underwriter for Bangor Punta. The three individual Piper petitioners (Piper family) were officers and directors of Piper and owned about 501,090 of the 1,644,890 outstanding Piper shares (J.A. A–8).[1]

Chris-Craft made its first purchase of Piper stock on December 30, 1968. On January 23, 1969, Chris-

[1] This brief summary of facts is taken from the opinion of the court of appeals in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F. 2d 341, 349–355 (C.A. 2), certiorari denied, 414 U.S. 910; A–7 to A–21 in the Joint Appendices to the petitions for a writ of certiorari (hereinafter "J.A.").

Craft announced a cash tender offer to Piper stockholders for 300,000 shares of Piper stock at $65 per share.[2] By February 3, as a result of its January tender offer and other purchases, Chris-Craft held approximately 33 percent of the outstanding shares of Piper. Chris-Craft thereafter made two exchange offers (effective May 15 and July 24) and additional purchases that brought its holdings to 42 percent of Piper's shares (J.A. A–9 to A–14).

In response to Chris-Craft's bid for control of Piper during this time, the Piper family, Bangor Punta, and First Boston took the following actions, which formed the basis of Chris-Craft's complaint:

a. On January 27, 1969, Piper sent a letter to its stockholders which stated that its board of directors "has carefully studied [the Chris-Craft January 23 cash tender] offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders." The letter did not reveal that First Boston had advised Piper that the price offered was "fair and equitable" (J.A. A–11, A–38).

b. On January 29, 1969, Piper issued a press release which announced that Grumman Aircraft Engineering Corporation (Grumman) "has agreed to purchase" 300,000 shares of Piper at $65 per share. The release did not reveal that Grumman had an option to put the shares back to Piper after six months at Grumman's cost plus interest (J.A. A–11 to A–12, A–39).

[2] The closing price of Piper stock on the New York Stock Exchange on January 22, 1969, had been $52.50 per share (J.A. A–10).

c. On May 8, 1969, Piper and Bangor Punta disclosed in a press release that Bangor Punta was acquiring the Piper family's stock holdings and that Bangor Punta would make an exchange offer to the remaining Piper stockholders on a packge of Bangor Punta securities that would be valued by First Boston at not less than $80 per Piper share.[3] On May 29, Bangor Punta filed a registration statement for the proposed general exchange offer. Thereafter, on June 4, June 20, and July 25, Piper sent letters to its stockholders in which it criticized Chris-Craft's May 15 exchange offer and recommended the Bangor Punta offer. The letters did not disclose that Bangor Punta had agreed that if First Boston should determine that the package of Bangor Punta securities received by the Piper family in exchange for its shares were valued at less than $80 per share on the opening day of the general exchange offer, Bangor Punta would make up the difference if it should win control of Piper (J.A. A–14 to A–17).

d. Shortly after it announced that it would make the general exchange offer, Bangor Punta negotiated cash purchases of 120,200 shares of Piper (approxi-

[3] On May 26, the Securities and Exchange Commission brought an action against Piper and Bangor Punta in the United States District Court for the District of Columbia, charging that the May 8 press release violated Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. 77e(c), and Rule 135, 17 C.F.R. 230.135, in that the release constituted an offer to sell securities before any registration statement had been filed (J.A. C–9 to C–15). Without admitting any of the allegations of the complaint, both defendants consented to issuance of an injunction prohibiting further such releases before filing of a registration statement (J.A. A–15, C–6).

mately 7.5 percent of the outstanding shares) in several private transactions (J.A. A–16).

e. Bangor Punta acquired another 7 percent of the outstanding Piper shares in its general exchange offer of July 18, 1969. In the prospectus issued in connection with that offer, Bangor Punta's railroad subsidiary was carried at its appraised value as of September 1965, *i.e.,* $18.4 million. First Boston acted as underwriter and dealer-manager for the offer, and in these capacities it endorsed and distributed the prospectus to Piper stockholders. Neither the preliminary nor the final prospectus, nor the First Boston opinion letter which valued the package of Bangor Punta securities at not less than $80 per Piper share, mentioned Bangor Punta's contemporaneous negotiations for the sale of the railroad for $5 million, or $13.5 million less than the amount at which it was carried on Bangor Punta's books (J.A. A–43 to A–45).[4]

[4] The Securities and Exchange Commission thereupon brought an action against Bangor Punta, charging that its registration statement and prospectus were false and misleading because they failed to disclose these negotiations, in violation of Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b), and Rule 10b–5, 17 C.F.R. 240.10b–5. The district court agreed that Bangor Punta's registration statement contained misleading omissions of material fact but denied the Commission's request for an injunction, since it found that the omissions were attributable to "mere negligence" and that Bangor Punta was "unintentionally in error." The court did direct Bangor Punta, however to make an offer of rescission to Piper stockholders who had accepted the Bangor Punta exchange offer (J.A. A–143, D–1 to D–18).

A divided court of appeals affirmed the district court's denial of the injunction after hearing the Commission's appeal together with the appeals in the instant case, finding that the "didactic effect" of the damages to be assessed in this action made it unnecessary for the court to enjoin Bangor Punta for its violations (J.A. A–77 to A–93, A–100). This Court denied certiorari. 414 U.S. 910.

By September 5, Bangor Punta had acquired 51 percent of the outstanding Piper shares and therefore had won control (J.A. A–18).

2. PROCEEDINGS BELOW

a. On May 22, 1969, when the contest for control of Piper was still being waged, Chris-Craft brought suit against the Piper family, Bangor Punta, and First Boston in the United States District Court for the Southern District of New York, alleging violations of Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. 77e(c), Rule 135, 17 C.F.R. 230.135, Sections 9, 10(b), and 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78i, 78j(b), and 78n(e), and Rules 10b–5 and 10b–6, 17 C.F.R. 240.10b–5 and 240.10b–6. The complaint sought damages and equitable relief.

On July 22, Chris-Craft moved for a preliminary injunction to prevent Bangor Punta from gaining control of Piper. The court denied the motion on the ground that Chris-Craft had failed to establish either that it would suffer irreparable injury if the motion were denied or that there was a substantial likelihood

that it would prevail on the merits (J.A. C–32 to C–48).

On expedited appeal, the court of appeals, sitting *en banc,* sustained the denial of preliminary relief on the ground that no irreparable injury had been shown. The court disagreed, however, with the district court's conclusion that there was no reasonable certainty that Chris-Craft would prevail on the merits. The court of appeals held that Bangor Punta had violated Rule 10b–6 by making cash purchases of large blocks of Piper stock shortly after announcing that it would make an exchange offer,[5] and it remanded for a determination, *inter alia,* of an appropriate remedy (J.A. C–1 to C–18).

b. On remand, Chris-Craft limited its claim for relief to damages. After a trial, the district court found that the Piper family had not misled Piper stockholders or Chris-Craft by its letters criticizing Chris-Craft's offers or by its announcement of the Grumman agreement; that, although Bangor Punta's registration statement and prospectus were "unintentionally in error" in failing to disclose the negotiations for the sale of its railroad, Chris-Craft had failed to prove either *scienter* or causal effect; and that First Boston had not engaged in any conduct which operated as a fraud upon Chris-Craft or the Piper stockholders and should not be held liable for the actions of its client (J.A. A–125 to A–162). Having thereby determined that Chris-Craft's claims were without merit, the court found it unnecessary to decide "whether

[5] Chief Judge Lumbard dissented from this holding (J.A. C–28 to C–31).

§ 14(e) may be separately invoked by one competitor for corporate control against another" (J.A. A–134).

On appeal, the court of appeals held that Chris-Craft, as a competing tender offeror, had standing to bring an action for money damages on the basis of violations of Section 14(e) of the 1934 Act. The court reasoned that the statutory objective of Section 14(e), the elimination of material omissions and misstatements in communications favoring or opposing tender offers, would be furthered by recognizing a cause of action on behalf of contestants for control who were injured by such omissions and misstatements, and that where a contestant for control has been defeated in a contest in which its opponent and others committed such violations, and the margin of victory was small, injury could be presumed (J.A. A–24 to A–33).

On the merits, the court held that the Piper family had violated Section 14(e) by making material misleading statements in its January 27 letter to stockholders, its January 29 press release and shareholder letter announcing the agreement with Grumman, and its June and July letters to stockholders (J.A. A–37 to A–41); that Bangor Punta had violated Section 14(e) by failing to disclose its negotiations for the sale of its railroad at a price far below the figure at which the railroad was carried in its registration statement and prospectus (J.A. A–41 to A–48); and that First Boston had violated Section 14(e) by failing to investigate the correctness of the carrying value of the railway after becoming aware of the negotiations for its sale (J.A. A–48 to A–55). The court further held that Bangor Punta's purchase of blocks

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of Piper stock in violation of Rule 10b-6 also had operated to deny Chris-Craft a fair chance to compete for control (J.A. A-63 to A-67).

The court remanded the case to the district court for a determination of the amount of damages, with directions to enter a judgment "assessing damages against all defendants jointly and severally" (J.A. A-69). This Court denied certiorari. 414 U.S. 910.

c. On remand, the district court awarded Chris-Craft compensatory damages of $1,673,988, plus pre-judgment interest. In computing damages, the court determined that the fair market value of Piper stock as of September 5, 1969 (the date Bangor Punta achieved majority control) was $48 per share and that the "premium value" of Chris-Craft's plurality block of Piper stock before Bangor Punta obtained control, representing the premium over fair market value that a willing buyer would have paid for an opportunity to contest with Bangor Punta, in a fair fight, for the control of Piper, was 5 percent of the fair market value, or $2.40 per share (J.A. B-43 to B-87).

The court of appeals increased the damages to $25,793,365, plus pre-judgment interest. Holding that the district court had applied an incorrect formula for computing damages, the court of appeals determined damages as the difference between the amount paid by Chris-Craft for its Piper stock (about $64 per share) and the amount that Chris-Craft could have realized upon a sale of that stock through an underwriter, after the time-consuming process of preparing and filing a registration statement following

the contest for control ($27 per share in January 1970) (J.A. B-1 to B-42).

The court of appeals denied petitioners' motion for rehearing with suggestion for rehearing *en banc* (J.A. E-3 to E-6).

ARGUMENT

1. The court of appeals correctly held that a defeated contestant for corporate control has a cause of action for money damages against persons who, by violating Section 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78n(e), in connection with tender offers made during the control contest, deprived the defeated contestant of a fair opportunity to compete for the purchase of shares in the target company. This question does not warrant further review in this case.

a. Section 14(e) makes unlawful "any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer * * * or any solicitation of security holders in opposition to or in favor of any such offer * * *." That provision, which was added to the 1934 Act by the Williams Act of 1968, 82 Stat. 457, was intended to make specifically applicable to tender offers, and to solicitations with respect to such offers, the antifraud proscriptions that had long applied to purchases and sales of securities and to proxy solicitations under earlier securities statutes and the rules adopted by the Commission thereunder. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968); S. Rep. No. 550, 90th Cong., 1st Sess. 3, 4, 11 (1967).

There is no substantial question but that a person who is induced by fraud to accept a tender offer has a

cause of action for money damages under Section 14(e) against the person committing the fraud. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60; cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730. The target corporation also would have a right to bring suit to enforce the statutory proscription in an appropriate case. Cf. *Rondeau* v. *Mosinee Paper Corp., supra*, 442 U.S. at 62–63. Similarly a shareholder of the target corporation may bring such a suit, even if he has not personally sustained an injury. Cf. *Mills* v. *Electric Auto-Lite*, 396 U.S. 375; *J. I. Case Co.* v. *Borak*, 377 U.S. 426. The question here is whether competing tender offerors, who suffer injury as a result of another's violations of Section 14(e), are also entitled to bring suit. We believe that both the legislative purpose and the statutory text require that that question be answered in the affirmative.

The legislative purpose was to ensure both "openness and truthfulness" (J.A. A–27) and fairness and equality of opportunity in connection with takeover bids. *Rondeau* v. *Mosinee Paper Corp., supra*, 422 U.S. at 58–59. See also *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937, 944–945 (C.A. 2). That purpose can be accomplished only by recognizing that the statute protects tender offerors as well as the target corporation and its shareholders. Moreover, the statutory text specifically proscribes, *inter alia*, deceptive practices "in connection with * * * any solicitation of security holders in *opposition* to [a tender] offer" [emphasis supplied]. Thus,

by its express terms, the statute protects tender offerors against dishonest or unfair opposition or competition. In short, tender offerors, like shareholders and management of the target corporation, are within "the class for whose especial benefit the statute was enacted." *Texas & Paper Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39.

This prohibition against unfair opposition is best policed by tender offerors themselves, through private lawsuits. The individual shareholders who succumb to the fraud, either by rejecting the tender offer or by accepting that of a competitor, may not have sufficient resources or adequate incentive to contest the fraud. The target corporation and its management may, as here, be among the guilty parties. The Securities and Exchange Commission has limited resources and may not be able to monitor every corporate takeover bid. Accordingly, lawsuits by injured tender offerors provide "a necessary supplement to Commission action [,] * * * necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak, supra*, 377 U.S. at 432–433.[8]

[8] In a case such as this, where the lawsuit is against, *inter alia*, a successful takeover bidder that acquired control in part through an exchange offer, an award of money damages might at first blush appear to have the anomalous result of imposing liability, indirectly, upon those shareholders of the target corporation who succumbed to the fraud by accepting the defendant's exchange offer. However, those shareholders may be protected against that result, as they have been here (see J.A. A–89 to A–93), by a judicial order extending to them the remedy of rescission. Of course, they will be unlikely to avail themselves of that remedy if the market value of the stock of the target corporation has declined relative to that of the securities they received in exchange.

b. Petitioners, however, rely upon the holding of *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, that only actual purchasers and sellers have a cause of action under Rule 10b–5, contend that actions under Section 14(e) similarly should be confined to actual purchasers and sellers. But the decision in *Blue Chip Stamps* was bottomed upon the fact that both Rule 10b–5 and Section 10(b) of 1934 Act, under which that Rule was promulgated, proscribed fraud only "in connection with the purchase or sale" of securities. See 421 U.S. at 732–734. In contrast, Section 14(e) contains no such purchaser-seller limitation. To the contrary, that provision also proscribes fraud in connection with solicitations in opposition to, or in competition with, a tender offer, and it is that proscription that in invoked here.[7]

Moreover, the policy considerations militating in favor of restricting private damage actions under Rule 10b–5 to purchasers and sellers are not present in litigation under Section 14(e). In *Blue Chip Stamps,* this Court observed that allowing a private cause of action by one who claimed only that he would have purchased stock but for the misrepresentation would create the potential for vexatious litigation by plaintiffs who have little chance of success at trial, and whose alleged damages would be entirely speculative, but who could obtain favorable settlements

[7] The court below was the same court that first established the *Birnbaum* rule, approved by this Court in *Blue Chip Stamps*, limiting standing under Rule 10b–5 to purchasers and sellers. *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (C.A. 2), certiorari denied, 343 U.S. 956.

because their lawsuits threaten to disrupt normal business activities (421 U.S. at 737–746). No similar consideration militates against granting a contestant for corporate control, who has risked capital in obtaining shares of the target company, a remedy at law for substantial injury caused by a competitor's violations of the securities laws.[8]

Petitioners further contend that, regardless whether there is an implied private cause of action under Section 14(e), no such cause of action arises under Rule 10b–6. That issue does not, however, appear to be presented by this case. Since Section 14(e) proscribes, *inter alia,* "manipulative acts or practices in connection with any tender offer," a right of action under that provision necessarily embraces a cause of action for any manipulative act or practice committed in connection with the tender offer, including acts more specifically proscribed by Rule 10b–6.

c. The question of the proper scope of the right of action under Section 14(e) concededly is one of substantial importance to persons engaged in contests for corporate control, and of some importance to the securities industry generally. But two courts of appeals already have expressly accepted and relied upon the decision in the instant case in addressing this

[8] Moreover, in *Blue Chip Stamps* the Court observed that the common law tort of misrepresentation had evolved in the context of business dealings among persons known to each other (421 U.S. at 744–745). A contestant for corporate control who loses his investment as a result of the misrepresentations of another contestant, unlike a potential purchaser of securities, is in a position closely analogous to one whose prospective advantage in a business relationship is tortiously intruded upon (see J.A. A–30).

question. *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d 579 (C.A. 5); *H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F. 2d 421 (C.A. 1)). No court of appeals has rejected the decision below in considering this question.[9] If anything, therefore, there may be less reason to review this issue now than when this Court previously denied certiorari in this case (414 U.S. 910). Accordingly, in view of the manifest correctness of the decision below, the absence of any direct conflict among the courts of appeals, and this Court's previous denial of certiorari on the same issue in this case, we do not believe that this issue warrants review at this time.

2. In our view, an underwriter, such as petitioner First Boston, who violates Section 14(e) of the 1934 Act may be held liable for money damages in excess of the maximum liability that could be assessed against

[9] But cf. *Klaus* v. *Hi-Shear Corp.*, C.A. 9, Nos. 75–1544 *et al.*, decided December 15, 1975. In *Klaus*, involving a contest for control of Hi-Shear Corporation, the court of appeals reversed the district court's grant of a contestant's motion for a preliminary injunction against the voting of a particular block of stock held by management, which opposed the contestant. The court of appeals reasoned that, although the contestant had been misled to his detriment by management's misrepresentation that his tender offer, if successful, would result in the contestant obtaining majority control (when in fact management intended to dilute the voting power of his shares by issuing the block in question), nevertheless the contestant, to succeed in his suit for injunctive relief, would have to show irreparable harm to the cash tender offerees, not to himself, since the Williams Act was not intended to protect him (slip op. 10). This ruling was not necessary to the court's holding, however, for the court went on to decide that any delay in the disenfranchisement of the block of stock would not cause the contestant irreparable harm (slip op. 13). The court did not refer to the instant case.

it under Section 11 of the 1933 Act, as amended, 15 U.S.C. 77k ("the total price at which the securities underwritten by him * * * were offered to the public") in a suit brought by a purchaser for a material misstatement or omission in a registration statement.[10] The limitation placed on an underwriter's liability under the 1933 Act simply recognizes that the loss suffered by a defrauded purchaser will not exceed the price he paid for the securities. In contrast, violations of Section 14(e) may cause losses in excess of the price at which the securities were offered to the public; the losses incurred by an unsuccessful contestant for corporate control as a result of the deceptive practices of a competitor's underwriter may well exceed the total price at which the competitor's securities were offered.

Nothing in the 1934 Act would bar the award of fully compensatory damages in such circumstances, and to make such relief available seems to be in accord with the general policy of the securities laws. Accordingly, we believe that it would be improper to apply the Section 11 limitation, which might prevent the award of full compensation, to a situation where by its literal terms it does not apply.

Moreover, liability under Section 11 is imposed even where the underwriter is guilty only of a failure to observe due diligence. See Section 11(b); *Escott* v. *BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.

[10] By holding First Boston jointly and severally liable for more than $25 million plus pre-judgment interest, the court of appeals imposed a potential liability approximately three times as great as could have been imposed under Section 11 of the 1933 Act.

N.Y.); *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544 (E.D. N.Y.) As the court of appeals noted, however, "§ 14(e) imposes liability upon an underwriter in favor of a competing offeror * * * as an aider and abettor of the issuer *if* he was aware of a material falsity in the registration statement or was reckless in determining whether material falsity existed" (JA. A–49; emphasis added). Here, the court found that First Boston's conduct went "far beyond mere negligence" (J.A. A–54, n. 24), and "amounted to an almost complete abdication of its responsibility to potential investors" (J.A. A–55). Since the court of appeals imposed a requirement of *scienter* in finding a violation of Section 14 (e), it would have been inappropriate to limit liability to that which could arise from mere negligence under Section 11.

The scope of an underwriter's liability under Section 14(e) is a matter of substantial importance to the securities industry. But neither the court of appeals nor any other court has expressly passed on this question.[11] Accordingly, if this Court were to grant review on this issue, it would be placed in the inappropriate position of deciding an important question as a matter of first impression, without the benefit of the views of any lower court. In these circum-

[11] The question was presented to the court of appeals for the first time in a petition for rehearing, with suggestion for rehearing *en banc*, that was supported by the Securities and Exchange Commission. The court denied the petition without opinion (J.A. E–3 to E–8).

stances, the Court should not initially undertake to decide this question.[12]

3. The court of appeals measured damages by comparing Chris-Craft's holdings in Piper stock valued as a plurality block with incipient control before Bangor Punta acquired actual control in September 1969, with the same holdings valued as an illiquid minority block thereafter. The court determined that the value of Chris-Craft's plurality holdings had been approximately $64 per share (Chris-Craft's average cost) and that the value of the minority block was only $27 per share (the amount Chris-Craft would have realized upon a public sale held at the earliest feasible date following the end of the control contest) (J.A. B–21 to B–32).

a. We believe it would have been preferable for the court of appeals to have measured damages not from Chris-Craft's plurality position but rather from the control position Chris-Craft might have achieved but for petitioners' violations of the securities laws. The approach followed by the court compensated Chris-Craft only for the immediate economic injury occasioned by the loss of the control contest and not for the loss of its expectancy interest in gaining control. It may be assumed that the per share value of a con-

[12] However, in view of the importance of this issue to the private parties here, the court may consider it appropriate to grant First Boston's petition for a writ of certiorari for the limited purpose of vacating the judgment below and remanding to the court of appeals for explicit consideration of the proper scope of its liability as an underwriter.

trolling block of shares is greater than that of only a plurality block; indeed, Bangor Punta paid $70 to $80 per share for its controlling block (J.A. B–26). This suggests that the value of Chris-Craft's holdings, as of September 1969, would have substantially exceeded its average cost of $64 per share if it had succeeded in obtaining control, an objective that was frustrated by petitioners' violations. Considerations of equity, as well as full effectuation of the legislative policies underlying the Williams Act, require the award of expectancy damages, measured from the value the defeated contestant's holdings would have had if it had gained control.

Expectancy damages should, however, be discounted by the likelihood that the defeated contestant would have lost the control contest even in the absence of any violations of the securities laws.[13] The award of undiscounted damages would risk substantial overcompensation of the defeated contestant for control. In this case, for example, although Chris-Craft was able to acquire 42 percent of the outstanding Piper stock even in the face of petitioners' violations, and over one-fourth of Bangor Punta's 51 percent share was acquired unlawfully, there may have been a possibility that Chris-Craft would have lost that contest

[13] The court of appeals' use of the value of a plurality block of shares, rather than a control block, as the starting point for measuring damages may have been intended as an implicit discounting mechanism. We believe, however, that it is analytically preferable to consider the worth of the prize separately from the likelihood of winning it.

even in the absence of any violations of the securities laws.

In individual cases, however, the approach we suggest here may generate damage determinations roughly comparable to those resulting from that used by the court of appeals. As indicated above, the court of appeals assessed damages at $37 per share (the difference between $64 and $27 per share).[14] Almost identical damages would have been awarded under

[14] We question whether the court of appeals' valuation of Chris-Craft's illiquid minority block of stock at $27 per share was correct. That figure represents the net amount Chris-Craft could have realized from a public sale in January 1970, a date that was picked because the court estimated that the process of preparing and filing a registration statement for a public sale would take at least four months from the time the injury had become complete in September 1969 (J.A. B–29 to B–30). But since the district court had found that the market value of Piper stock was $48 per share immediately after Bangor Punta acquired control in September 1969 (J.A. B–57), and there was evidence that at that time a public sale of Piper stock would have produced net proceeds of between $41.60 and $43.50 per share (J.A. B–29), the use of the January 1970 date appears to compensate Chris-Craft for a loss caused by a post-injury decline in the market value of Piper stock of approximately $15 per share—a loss that Chris-Craft would have sustained even if petitioners had not violated the securities laws and, indeed, even if Chris-Craft itself had succeeded in the contest for control (Chris-Craft has never contended that it would have divested its shares upon securing majority control, or that it could have sold a minority block in a public sale in Septmber 1969). But although the question whether petitioners should be required to compensate Chris-Craft for losses attributable to a decline in the market value of Piper stock occurring after the end of the control contest is important to the determination of damages in this case, it does not appear to be of sufficient general importance to warrant review by this Court.

our approach if the value of a control block at the time Bangor Punta obtained control had been determined to be $77 per share (as a court might have decided in view of the price paid by Bangor Punta), and the probability that Chris-Craft would have won the control contest in the absence of any violations of the securities laws to be 75 percent ((77—27)×.75=50×.75=37.5). Accordingly, we cannot say that the court of appeals would have arrived at a substantially different determination of damages if it had followed the approach we suggested here.

b. The question of the proper measure of damages for loss of opportunity to gain corporate control in consequence of a violation of Section 14(e) is important because as a practical matter it is the method of fixing damages that determines the effectiveness of the private right of action as a tool for enforcing the proscriptions of Section 14(e). Moreover, use of an incorrect measure could distort the allocation of risks in contests for corporate control. Thus if this Court grants review of the question whether a competing tender offeror has a right of action under Section 14(e), it would be appropriate also to review the court of appeals' determination of damages. But the proper measure of damages in a case such as this does not appear to be a matter of such general importance as independently to warrant this Court's attention at this time.

CONCLUSION

For the foregoing reasons, the questions presented do not warrant review by this Court.

Respectfully submitted.

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